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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: **FNPRM on the Section 252(i) "Pick and Choose" Rule; CC Docket Nos. 01-338, 98-147 and 96-98**

Dear Ms. Dortch:

SBC Communications Inc. ("SBC") submits this letter in response to a letter filed on June 9, 2004 by CompTel/Ascent ("CompTel") in the above referenced dockets. In its letter, CompTel asks that the Commission continue to permit requesting carriers to "pick and choose" among arbitrated provisions of interconnection agreements, even if it no longer allows carriers to "pick and choose" among negotiated provisions.[1] It claims that this carve-out fully addresses the concerns underlying the Commission's proposal to eliminate pick and choose, while obviating the need for what would otherwise be superfluous arbitrations.

As discussed below, CompTel is wrong on both counts. The complete elimination of the pick and choose rule is an essential step towards encouraging negotiated interconnection agreements and, contrary to CompTel's claim, would in no way necessitate superfluous arbitrations. Moreover, and, in any event, there is no statutory basis – and there could be no legal justification – for the distinction CompTel proposes between negotiated and arbitrated provisions.

Turning, first, to the legal deficiencies in CompTel's proposal – which are dispositive - CompTel's proposition that arbitrated provisions warrant different treatment under section 252(i)

[1] Although CompTel's letter focuses solely on the availability of pick and choose for arbitrated provisions, the proposed rules that CompTel attaches to its letter would retain pick and choose even for negotiated provisions. Indeed, although CompTel never discusses the issue, it appears that, its proposed rule would *expand* the availability of pick and choose for arbitrated provisions by eliminating the requirement that carriers adopting the provisions of an interconnection agreement also accept all reasonably related provisions. In other words, CompTel's proposed rule would represent a notable step *backwards*.

is an unlawful interpretation of the statute and must be rejected outright in light of the express language contained in section 252 of the Act. Section 252(i) of the Act provides:

> A local exchange carrier shall make available any interconnection, service or network element provided ***under an agreement approved under this section*** to which it is a party to any other requesting carrier upon the same terms and conditions as provided in the agreement. (Emphasis added).

With respect to agreement approval, Section 252(e)(1) of the Act provides:

> APPROVAL REQUIRED - Any interconnection agreement ***adopted by negotiation or arbitration*** shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies. (Emphasis added).

Based upon this express language, there is no basis upon which different rules could be promulgated for the adoption of arrangements contained in agreements approved under Section 252(e) of the Act, based upon whether the agreement was negotiated or arbitrated. The statutory language provides that any agreement approved under the processes outlined in section 252 is available for adoption by competing carriers. Consequently, all agreements that are approved under section 252(e), which includes negotiated and arbitrated agreements arrived at pursuant to 252(a) and (b) respectively, are available for adoption under section 252(i). Therefore, the Commission's interpretation of section 252(i) must apply equally to arbitrated and negotiated agreements.

CompTel's proposal overlooks the statutory construction and essentially re-writes the Act to impose different treatment for arbitrated provisions. If Congress intended to provide a different process for the adoption of arbitrated provisions, at a minimum, Congress would have included language in 252(i) that made a distinction between agreements reached under 252(a) and 252(b). Since Congress did not make such a distinction, CompTel's proposal cannot be reconciled with the Act.

CompTel's proposal, though, is not only legally infirm, but also inconsistent with sound public policy. CompTel claims that the continued availability of pick and choose for arbitrated provisions would in no way undermine the goal of encouraging negotiated agreements. That is simply untrue. If CLECs that negotiated their own interconnection agreements are nevertheless free to adopt the arbitrated provisions of other agreements, they can deprive incumbent LECs of the benefits of their bargain, to virtually the same extent as if they could also adopt the negotiated terms of other agreements. In either case, the incumbent LEC will have little incentive to engage in the kind of meaningful "give and take" that is so critical to productive commercial negotiations.

Indeed, contrary to CompTel's claim, the continued availability of pick and choose for arbitrated provisions will stifle negotiations. Arbitrated interconnection agreements are almost invariably the result of some level of compromise. Among the many issues generally submitted for

arbitration, the arbitrator typically attempts to strike some sort of balance by resolving some issues in favor of one party and other issues in favor of the other party. Permitting carriers to pick and choose among arbitrated provisions, would allow an adopting carrier to upset that balance by cobbling together an agreement that consists entirely of the various CLEC "wins" from multiple arbitrations. Such an unbalanced agreement would never be obtainable in its own right through arbitration, much less negotiation, which is precisely the point from CompTel's perspective. Thus, far from encouraging negotiations, CompTel's proposal would leave competitors with little incentive to negotiate.

For similar reasons, CompTel is wrong when it claims that the elimination of pick and choose for arbitrated provisions will lead to superfluous negotiations. In so arguing, CompTel assumes that a carrier could obtain through arbitration precisely the same agreement it could obtain by piecing together the various arbitrated provisions of multiple interconnection agreements. That assumption ignores the compromises that underlie virtually all state arbitrations. The reality is that an agreement that reflects a piecing together of multiple arbitrated provisions would likely be unattainable in a single arbitration. Moreover, even if it were attainable, as soon as one CLEC obtained such an agreement through arbitration, that entire agreement would be available for adoption to other CLECs, even without pick and choose. Thus, the scores of redundant arbitrations that CompTel predicts would not occur.

In short, CompTel has presented no basis for the Commission to retain the pick and choose rule in any way, shape, or form. The record overwhelmingly shows that the pick and choose rule discourages carriers from entering into true customized agreements for fear that provisions will be adopted by unrelated parties that are not in a position to deliver the benefit that the ILECs are due from the bargain struck between the original parties.[2] Indeed, the success of SBC and Sage in negotiating commercial wholesale arrangements outside the context of section 252(i) underscores the extent to which the elimination of pick and choose can spur a more meaningful negotiation process. Had SBC or Sage understood their agreement to be subject to pick and choose, that agreement would not have been possible. *Neither* party would have agreed to it.

Furthermore, eliminating this rule is even more important now, given the status of the Triennial Review proceeding. Given that new rules will soon be adopted that will undoubtedly spark new rounds of negotiations, the Commission should eliminate the pick and choose rule to ensure that ILECs are free to negotiate as Congress intended.

In addition, the Commission is now encouraging ILECs to offer commercial products and services that are not required to be offered under Sections 251(b) and (c) of the Act.[3] The

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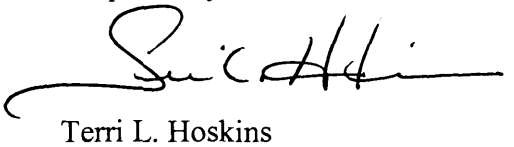
[2] *See* BellSouth Comments at p.5; CenturyTel Comments at p. 3; Qwest Comments at p. 3; SBC Comments at p. 3; USTA Comments at p. 3; Verizon Comments at p. 2.

[3] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, et al., *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, Footnote 755 (rel. August 21, 2003). See also Press Release dated March 31, 2004, Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps; and Press Releases dated April 29, 2004, FCC Chairman Michael Powell's Comments on AT&T's Proposal to Transition to

Commission should clearly state that such individually negotiated commercial agreements for non-251(b) and (c) products and services are not subject to section 252(i) at all (including without limitation the FCC's existing pick and choose rule), given that such commercial agreements are not subject to approval under Section 252(e) of the Act. Rather, the filing and approval requirements set forth in Section 252(e) of the Act apply only to those agreements negotiated and/or arbitrated by the Parties under Sections 251/252 of the Act (and Section 252 applies only to a request for interconnection, services or network elements pursuant to section 251). Consequently, any commercial arrangements negotiated outside of Sections 251/252 of the Act and which do not involve 251/252 interconnection, services or network elements are clearly not subject to section 252 of the Act.

For all of the above reasons, the Commission should reject CompTel's proposed rule and adopt a new rule interpreting and implementing section 252(i) that makes clear that under Section 252(i): (1) requesting carriers must adopt all of the individual interconnection, network element and service arrangements contained in an approved and effective agreement in that state; and (2) that only arrangements contained in interconnection agreements negotiated and/or arbitrated under Sections 251/252 of the Act are subject to filing/approval under section 252(e) of the Act and to adoption under Section 252(i) of the Act.[4]

Respectfully submitted,



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Facilities-Based Competition, and FCC Commission Kevin J. Martin Praises Industry Efforts to Reach Agreement on Local Phone Competition.

[4] In any event, the Commission should also make clear that individual interconnection, service and network element arrangements contained in approved agreements continue to only be available for adoption for a "reasonable period of time" after the approved agreement is made available for public inspection under Section 252 of the Act.